United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7175

B

P/6

United States Court of Appeals

For the Second Circuit

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

---

BRIEF FOR APPELLANTS

MARSHALL BEIL
KARPATKIN, POLLET & LEMOULT
1345 Avenue of the Americas
New York, New York 10019
(212) 765-2700
Attorneys for Plaintiffs-Appellants

MICHAEL N. POLLET
STEVEN DELIBERT
Of Counsel

UNITED STATES COURT OF APPEALS
FILED
MAY 27 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

	Page
Table of Cases and Authorities	iii
Statement of Issues Presented for Review	1
Statement of the Case	2
The Plaintiffs-Appellants	3
The Defendants-Appellees	4
The Avis-Mackell Conspiracy	5
The Conspiracy against Plaintiffs	6
Plaintiffs' Damages and Claims	9
Proceedings Below	10
Argument	12
I. The District Court Erred in Dismissing the Complaint as Time-Barred.....	12
A. The Federal Concealment Doctrine Applies to this Action	15
B. The New York Concealment Doctrine Does Not Apply to this Action....	22
C. Uniform Application of the Federal Concealment Doctrine to Federal Civil Rights Plaintiffs Makes this Action Timely...	25
II. The Mackell Defendants' Actions are Not Protected by Absolute Immunity	30

Page

III. The Alternative Grounds for Dismissal of Defendants Monty and ITT Are Without Merit 40

A. Defendant Monty 41

B. Defendant ITT 43

Conclusion 44

TABLE OF CASES AND AUTHORITIES

CASES	Pages
Adickes v. Kress & Co., 398 U.S. 144 (1970)	19
Ames v. Vavreck, 356 F.Supp. 931 (D.Minn. 1973)	38
Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974)	37, 38, 39
Arroyo v. Schaefer, 548 F.2d 47 (2d Cir. 1977)	19
Atlantic City Electric Co. v. General Motors Co., 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963).....	16, 26-27
Bailey v. Glover, 21 Wall.(88 U.S.) 342 (1875).....	15,26
Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), cert. denied sub nom. Universal Builders, Inc. v. Clark, 400 U.S. 821 (1970)	16
Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F.2d 1139 (2d Cir. 1972)	31
Briggs v. Goodwin, 384 F.Supp. 1228 (D.D.C. 1974)...	38
Burkhart v. Saxbe, 397 F.Supp. 499 (E.D. Pa. 1975)	38
Conley v. Gibson, 355 U.S. 41 (1957)	12
Dacey v. New York County Lawyers' Association, 423 F.2d 188 (2d Cir. 1969)	33
Dodd v. Spokane County, Washington, 393 F.2d 330 (9th Cir. 1968)	38
Economou v. U.S. Dept. of Agriculture, 535 F.2d 688 (2d Cir. 1976)	31, 38-39

Cases	Pages
Ervin v. Lanier, 404 F.Supp. 15 (E.D.N.Y. 1975)	13
Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970)	12,43
Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975)	33
Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969)	23
Guild v. Hopkins, 271 App.Div. 234, 63 N.Y.S.2d 522, (1st Dept. 1946), aff'd, 297 N.Y. 477, 74 N.E.2d 183 (1947)	23
Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687, 315 N.Y.S.2d 601, (Civil Ct. 1970)	23
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959)	26
Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974)	37-38
Haines v. Kerner, 404 U.S. 519 (1972)	12
Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)	36-37
Hearing Aid Ass'n of Kentucky, Inc. v. Bullock, 413 F.Supp. 1032 (E.D.Ky. 1976)	38
Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975)	42

Cases	Pages
Holmberg v. Armbrecht, 327 U.S. 392 (1946)	15, 16, 25, 27, 29
Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974)	38
Imbler v. Pachtman, 424 U.S. 409 (1976)	30-31, 33, 37-39
Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974)	13, 14, 16, 25, 29a
Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955)	35
M & T Chemicals Inc. v. IBM Corp., 403 F.Supp. 1145 (S.D.N.Y. 1975)	23
Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969)	38
Maney v. Ratcliff, 399 F.Supp. 760 (E.D. Wis. 1975)..	38
Martin v. Merola, 532 F.2d 191 (2d Cir. 1976)	33
Meyer v. Frank, 550 F.2d 726 (2d Cir. 1977)	13, 14
Monroe v. Pape, 365 U.S. 167 (1961)	29
Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961)	15, 16, 21, 27-28, 29
National Life Insurance Co. v. Solomon, 529 F.2d 59 (2d Cir. 1975)	42
Pierson v. Ray, 386 U.S. 547 (1967)	32
Pollard v. United States, 384 F.Supp 304 (M.D. Ala. 1974)	16
Rizzo v. Goode, 423 U.S. 362 (1976).....	19

Cases	Pages
Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965)	33-35
Rousselle v. Perez, 293 F.Supp. 298 (E.D. La. 1968) ..	38
Shifrin v. Wilson, 412 F.Supp. 1282 (D.D.C. 1976)	38
Tomko v. Lees, 416 F.Supp. 1137 (W.D.Pa. 1976)	38
Walker v. Cahalan, 542 F.2d 681, (6th Cir. 1976), cert. denied, 45 U.S.L.W. 3690 (U.S., April 19, 1977)	37

STATUTES AND RULES

The Civil Rights Act of 1871 (42 U.S.C. § 1983)	passim
Fed.R.Civ.P. 12(b)(6)	11
Fed.R.Civ.P. 56	11,41-42 44
N.Y.C.P.L.R. § 203(a) (McKinney 1972)	22, 23,24
N.Y.C.P.L.R. § 203(f) (McKinney Supp. 1976)	22,24
N.Y.C.P.L.R. § 213(8) (McKinney Supp. 1976)	23
N.Y.C.P.L.R. § 214(2) (McKinney Supp. 1976)	13, 21,24
N.Y.C.P.L.R. § 214-a (McKinney Supp.1976)	23

OTHER AUTHORITY

McLaughlin, Practice Commentary to § 203, 7B McKinney's Consolidated Laws of New York (1972)	23

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

-against-

DOCKET NUMBER 77-7175

THOMAS J. MACKELL, JAMES D.ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

----------x

BRIEF FOR APPELLANTS

Statement of Issues Presented For Review

Plaintiffs-appellants appeal from the order of Judge George C. Pratt of the United States District Court for the Eastern District of New York granting defendants-appellees' motions to dismiss the complaint as barred by the applicable statute of limitations.

The issues presented for review are:

1. Does the federal concealment doctrine toll the running of the applicable statute of limitations to make plaintiffs' civil rights action, commenced within three years after plaintiffs first could have learned of the existence of their claim, timely?

2. Does a prosecutor have absolute immunity from a civil suit for damages for illegal acts committed during the course of an investigation conducted by the prosecutor prior to the initiation of criminal proceedings?*

3. Are the allegations of the complaint concerning specific acts committed by two defendants in furtherance of the conspiracy of all the defendants sufficient to preclude the dismissal of the complaint as to both defendants prior to the commencement of discovery when the relevant facts and documents are within defendants' sole knowledge and control?*

Statement of the Case

The gravamen of plaintiffs' civil rights action is the conspiracy among the defendants to subvert the criminal justice system for private gain, causing substantial injury to the plaintiffs who were innocent victims of defendants' illicit arrangements.

---

* As the district court dismissed the complaint as untimely, it did not reach these two issues on which several defendants relied as alternative grounds for dismissal.

As this matter was before the court below on defendants' motions to dismiss the complaint, the facts alleged in plaintiffs' complaint and supporting affidavits must be accepted as true.

The Plaintiffs-Appellants (Complaint, ¶ 3)(3a)*

Sta-Brite Auto Painting Corp. ("Sta-Brite") operated an auto body and repair shop in Jamaica, Queens. For nearly ten years prior to April 1971 Sta-Brite repaired cars for defendant Avis Rent-A-Car System, Inc. ("Avis") as a contractor mechanic.

G. Thomas and Catherine Cestaro are husband and wife. Mr. Cestaro, who is also a lawyer, is the principal owner and operator of Sta-Brite. His wife had very little substantive connection with Sta-Brite's operation; she did part-time secretarial work for the company and had a minor corporate title.

Richard Marchetti was, until April 1971, a damage control supervisor for Avis. Part of his job involved the review and approval of estimates for auto repair work submitted by Sta-Brite.

---

* References to the Appendix are prefaced with the page number followed by the letter "a", e.g., (3a).

The Defendants-Appellees (Complaint, ¶¶ 4-7)(3a-6a)*

The "Mackell defendants" are as follows:

Thomas J. Mackell was District Attorney of Queens County, and at the same time, chairman of the board of the Institute for the Advancement of Criminal Justice, a charitable foundation financed almost exclusively by $180,000 in contributions from defendant International Telephone & Telegraph Corporation ("ITT"), Avis' parent company.

James D. Robertson is Mackell's son-in-law and was his Deputy Chief Assistant District Attorney.

Frederick J. Ludwig, Joseph N. Monty and David J. McKeon were all members of Mackell's staff who participated in the investigation and criminal prosecution of plaintiffs. All three received free cars from Avis. Monty, in fact, was convicted and sentenced to four years in prison for taking bribes and other misconduct arising out of his receipt of money and cars from Avis in exchange for using the District Attorney's office as an Avis collection agency.

---

* Although the City of New York was originally named as a defendant, plaintiffs stipulated to the dismissal of the complaint against the City prior to the district court's decision (34a).

The "Avis defendants" are as follows:

Avis, a subsidiary of ITT, is engaged in the car rental business.

Salvatore Giuffreda, John Savage*, Bernard Nelson, Charles Napolitano and Stuart B. Stillman, are or were Avis employees who participated in the conspiracy with the Mackell defendants and the investigation and prosecution of plaintiffs.

ITT is the parent company of Avis, owning more than 50% of Avis' common stock.

The Avis-Mackell Conspiracy (Complaint,¶¶ 4,5,36-37)(3a-5a,11a-12a)

The agreement between Avis, ITT and the Mackell defendants, although deliberately concealed from the public, was apparently quite straightforward.

ITT gave Mackell's "foundation" over $180,000 for the sole benefit of Mackell, his family and staff, who freely used the money to finance their travel to the Virgin Islands, Alaska, and many other places.

Avis gave Mackell and his staff free limousines and other cars and gave Monty outright cash payments.

In return, the Queens County District Attorney's office gave the Avis defendants special treatment and served as a

---

* Savage, who apparently no longer works for Avis, has not been served and has not appeared in this action (52a).

collection and enforcement agency for Avis.

Both sides lived up to their agreement.

The Conspiracy Against Plaintiffs (Complaint, ¶¶10-35, 38-41) (6a-13a)

The purpose of the Avis-Mackell conspiracy was to permit Avis to use the power of the Queens County District Attorney's office in furtherance of Avis' private goals and desires. For reasons which, prior to discovery, are not yet known to them, the full force of this conspiracy was soon focused on plaintiffs.

Some time in 1970 or 1971, the Avis defendants decided that criminal proceedings should be instituted against plaintiffs for allegedly submitting false repair bills to Avis.

Thereafter, Savage and Nelson met personally with Mackell and Robertson and the four of them agreed that the Queens County District Attorney's office would investigate and ultimately prosecute the plaintiffs. Mackell and Robertson assigned Assistant District Attorney McKeon to carry out the plan.

The first step was the raid on Sta-Brite's premises on April 26, 1971. Acting pursuant to a purported grand jury subpoena prepared by McKeon, employees of the District Attor-

ney's office, Avis and the New York City Police Department descended on Sta-Brite and confiscated all thirty-two Avis cars under repair in Sta-Brite's shop. The defendants also took all of Sta-Brite's financial books and records.

This raid was without probable cause and was conducted for entirely illegitimate purposes. The cars and records seized did not produce any evidence of criminal activity by plaintiffs and the indictment later handed up against plaintiffs did not involve the cars confiscated in the raid.

This did not prevent the defendants, however, from keeping the confiscated cars and dispersing them through the Avis system. Avis never paid Sta-Brite for its $15,000 worth of work on these cars and has not satisfied Sta-Brite's mechanic's lien.

The day after the raid, Avis suspended Marchetti. He was later fired.

Defendants next escalated their harassment of plaintiffs by securing a grand jury indictment of plaintiffs for thirty counts of larceny, conspiracy and other charges, alleging that plaintiffs submitted to Avis a total of $2,469.47 in allegedly fraudulent bills.

Defendants secured this indictment without probable cause, indeed, without any basis in fact whatsoever. Upon information and belief, no evidence of wrongdoing by plaintiffs was ever submitted to the grand jury and exculpatory evidence was withheld (McKenna affidavit, ¶ 5)(31a). The plaintiffs were and are entirely innocent of the charges made against them.

Plaintiffs were arrested on June 8, 1971, at 6:30 A.M. in their homes, in full view of their families. Despite the paltry sum in the indictment, defendants issued a press release announcing that plaintiffs had been charged with a scheme to defraud Avis out of $340,000.

The trial began a year later on June 8, 1972.* At that time plaintiffs moved to challenge the legality of the raid on Sta-Brite. McKeon announced that no material seized at the raid would be introduced at trial, and the trial judge thereupon refused to rule on plaintiffs' motion.

After a half-day of testimony -- Giuffreda was the only witness and he did not testify to any wrongdoing by plaintiffs -- the plaintiffs accepted a plea bargain forced upon them by defendants to avoid the trauma and risks associated with a trial: the charges against the individuals would be

---

* The complete trial transcript, only about 140 pages, is part of the record as an exhibit to the affidavit of Richard Marchetti.

dismissed if the corporation, Sta-Brite, pleaded guilty (but without admitting wrongdoing) to one count of grand larceny in the third degree. In addition, Mr. and Mrs. Cestaro were required to sign a limited release in favor of Avis, and Marchetti had to sign general releases in favor of Avis and the Queens County District Attorney's office.

The conspiracy, however, was not over. Defendants continued to conceal their illicit relationship until public hearings in May 1973 held by the New York State Joint Legislative Committee on Crime made some facts public.

Thereafter, the Avis defendants in September and October 1973, offered Cestaro a large sum of money if the plaintiffs would attempt to have the Crime Committee call off its second public hearing on the Avis-Mackell conspiracy set for October 1973. Cestaro refused and the hearing was held.

The following winter, Monty was convicted of charges arising out of his connection with Avis. The Avis defendants received immunity and testified against Monty.

Plaintiffs' Damages and Claims (Complaint, ¶¶ 42-53)(13a-16a)

Defendants' actions ruined the lives and livelihoods of these innocent plaintiffs. Sta-Brite's business collapsed,

as did the income derived from it by the Cestaros. Marchetti was fired and has not been able to obtain comparable employment since. All the plaintiffs suffered grievous injury to their reputations and standing in the community and among their friends, families and colleagues.

In short, plaintiffs' reputations were shattered, their businesses and careers destroyed and their health impaired.

To redress these injuries, plaintiffs seek, in Counts One and Two of the complaint, $1,000,000 in compensatory and $1,000,000 in punitive damages for violations of their rights under various amendments to the Constitution (Count One) and pursuant to 42 U.S.C. § 1983 (Count Two). In Count Four the individual plaintiffs also seek a declaration that their arrests and prosecution were void and the expungement of all records relating thereto.*

Proceedings Below (1a)

The complaint was filed on April 12, 1976.

---

* Pursuant to stipulations prior to the district court's decision, plaintiffs withdrew Count Three (for damages under 42 U.S.C. §§ 1985 and 1986) as against all defendants and Count Four against the Avis defendants (35a-36a).

Prior to answering, the defendants all moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6) as barred by the statute of limitations and the doctrine of res judicata and for failure to state a claim for declaratory judgment (17a-23a). The Mackell defendants asserted the additional ground of prosecutorial immunity (22a). Defendant ITT also moved for dismissal for failure to state a claim as to ITT (19a-21a) and defendant Monty moved for dismissal and summary judgment (Fed.R.Civ.P. 56) for failure to state a claim as to Monty (23a-26a). Plaintiffs submitted affidavits and various exhibits in opposition to these motions (27a-33a).

The motions were argued before Judge Pratt on October 8, 1976 and on March 17, 1977 he issued a memorandum and order dismissing the entire complaint as time-barred (37a-53a). The next day the Clerk entered judgment dismissing the complaint (54a). This appeal follows.*

---

* Although the district court decided only the statute of limitations question, at the pre-argument conference of this appeal the Mackell defendants, ITT and Monty stated their intentions to press their individual contentions in this Court as alternative grounds to sustain the result below. All counsel agreed at the conference that the issues of res judicata and availability of declaratory relief would not be argued in this Court but would be reserved in the first instance for the district court in the event of a remand.

Argument

In deciding motions to dismiss in a civil rights action, the rule is that the complaint should not be dismissed unless "it appears 'beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Escalera v. New York City Housing Authority, 425 F.2d 853,857 (2d Cir.), cert. denied, 400 U.S. 853 (1970). The allegations contained in plaintiffs' complaint and supporting affidavits must be accepted as true, Escalera v. New York City Housing Authority, supra, and the Court "must view the allegations in the complaint in the light most favorable" to the plaintiffs. Id. at 861.

I.

THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT AS TIME-BARRED.

The error of the district court was to dismiss the entire complaint as barred by the applicable statute of limitations.

The court below correctly held (45a) that, in the absence of a federal statute, the limitations period governing plaintiffs' claims under both 42 U.S.C. § 1983 and the Consti-

tution is the three years provided by New York's C.P.L.R. § 214(2) -- liability based upon a statute.* Meyer v. Frank, 550 F.2d 726, 728 and n. 5 (2d Cir. 1977); Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974); Ervin v. Lanier, 404 F. Supp. 15, 20 (E.D.N.Y. 1975).

Where the court below went astray, however, was in the application of this period to plaintiffs' claim. The district court accepted plaintiffs' argument that the federal concealment doctrine tolled the running of the limitations period until May 1973 when the basic facts uncovering defendants' conspiracy were first made public. Since this action was filed on April 12, 1976, within three years after plaintiffs' discovery of the existence of their claim, application of the federal concealment doctrine would make this action timely.

The court below, however, misapplied the concealment doctrine and reached a contrary result. In so doing,

---

* N.Y.C.P.L.R. § 214 (McKinney Supp. 1976) provides in pertinent part: "The following actions must be commenced within three years: ...2. An action to recover upon a liability, penalty or forfeiture created or imposed by statute...."

the district court committed two errors:

1) it incorrectly interpreted New York State law to hold that the New York concealment doctrine (which, it held, in this instance would require an action to be brought within two years after discovery) applies to this type of case; and

2) it ignored clear holdings of this Court and the Supreme Court that the federal concealment doctrine is to be applied uniformly to all plaintiffs enforcing federally-created rights, regardless of the law of the State in which the district court sits.

This Court has repeatedly recognized that although the limitations period is "borrowed" from state law, the questions of when a claim accrues and whether it should be tolled are distinctly matters of federal law. Meyer v. Frank, supra; Kaiser v. Cahn, supra, 510 F.2d at 285,287.

And, as this Court recently stressed, civil rights claimants whose actions arise under federal law are entitled to the "full benefit of federal law" in determining the applicable statute of limitations. Kaiser v. Cahn, supra, 510 F.2d at 287. In failing to follow this principle, the court below committed error.

A. The Federal Concealment Doctrine Applies to this Action.

Plaintiffs have alleged -- and on this appeal plaintiffs' allegations must be accepted as true -- that although the criminal prosecution of plaintiffs ended in June, 1972, the Avis-Mackell conspiracy was concealed from them until public hearings were held by the New York State Joint Legislative Committee on Crime in May and October of 1973. Application of the concealment doctrine to this case would, therefore, toll the limitations period until at least May 1973, less than three years before the complaint was filed.

In Bailey v. Glover, 21 Wall. (88 U.S.) 342 (1875), the Supreme Court held that concealment of a fraud tolls a statute of limitation until the plaintiff discovers or should have discovered the fraud. Later, the Court held in Holmberg v. Armbrecht, 327 U.S. 392,397 (1946), that "[t]his equitable doctrine is read into every federal statute of limitation."

The Second Circuit, in Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961), interpreted these cases to include all actions to enforce federally-created rights, even when the federal court looks to state law for the limitations period.

Thus, although the Second Circuit has apparently not had occasion to apply the concealment rule to a civil rights action, in Kaiser v. Cahn, supra, 510 F.2d at 287, this Court, citing Holmberg and Moviecolor left no doubt that it thought the concealment doctrine does apply.* The court below agreed (46a-47a).

The federal concealment doctrine provides that a statute of limitations is tolled as long as a plaintiff, through no fault of his own, remains ignorant of his claim because defendants concealed the underlying facts. Moviecolor Limited v. Eastman Kodak Company, supra. As the Seventh Circuit held in Baker v. F & F Investment, supra, 420 F.2d at 1199, "[w]here...the wrong is self-concealing, little need be added in order to justify tolling the statute."

Plaintiffs here meet this test.

---

* See also Atlantic City Electric Co. v. General Motors Co., 312 F.2d 236,241 (2d Cir. 1962), cert. denied, 373 U.S.909 (1963),in which this Court held that the concealment doctrine applies to all federal actions "unless Congress expressly provides to the contrary in clear and unambiguous language."

Other courts have routinely applied the concealment doctrine to civil rights actions. See, e.g., Baker v. F & F Investment, 420 F. 2d 1191 (7th Cir.), cert. denied sub nom.Universal Builders, Inc. v. Clark, 400 U.S. 821 (1970); Pollard v. United States, 384 F. Supp. 304,307 (M.D. Ala. 1974).

The basic facts disclosing the existence of plaintiffs' claim -- the payments and free services given by Avis and ITT to the Mackell defendants and the early meetings between the Avis and the Mackell defendants which set in motion the events causing plaintiffs' injuries -- were all self-concealing and unknown to plaintiffs through no fault of their own.

Until the State Legislative Crime Committee's subpoenas and hearings exposed defendants' own documents and testimony to public scrutiny, there was simply no way plaintiffs could have learned the critical facts upon which their claims rest, namely, that

> -- Avis was supplying free cars to Queens District Attorney Mackell, his son-in-law and Deputy Chief Assistant Robertson, his Chief Assistant Ludwig and Assistant District Attorney McKeon -- all of whom participated in the investigation and criminal prosecution of plaintiffs (Complaint,¶¶ 4,37)(3a-4a, 11a-12a);
>
> -- ITT, Avis' parent company, had contributed over $180,000 to a "charitable foundation" for the sole use and benefit of Mackell, his family and staff (id.);
>
> -- Mackell's chief investigator Monty received cash payments from Avis (id.) (although plaintiffs had received some prior indication that Monty had had free use of an Avis car) (Cestaro affidavit, ¶ 3)(28a);

-- Avis employee Nelson had arranged for free A[illegible] cars to be supplied to the District [illegible]torney's office (Complaint, ¶¶ 4,37) (3a-4a, 11a-12a);

-- Nelson and another Avis employee, Savage, met personally with Mackell and Robertson at which time the four of them agreed to undertake a criminal investigation of plaintiffs and bring phony charges against them (id., ¶¶ 11-13) (6a-7a);

-- McKeon was the Assistant District Attorney who prepared the "subpoena" served on Sta-Brite on April 26, 1971 (id., ¶ 14)(7a);

-- Avis' participation in this raid was neither innocent nor legitimate (id., ¶¶ 17-20, 23) (7a-9a);

-- The raid itself was not conducted for legitimate law-enforcement purposes, but was a product of Avis' and ITT's payoffs to Mackell and his associates (id.);

-- The suspension and firing of Marchetti were not legitimately and innocently motivated but were part of defendants' conspiracy (id., ¶ 22)(8a);

-- The entire criminal prosecution, including the coerced plea bargain, was not a legitimate exercise of the lawful functions of the District Attorney's office but part of the Avis-Mackell conspiracy (id.,¶¶ 24-35)(9a-11a).*

These are not merely evidentiary details supporting plaintiffs claims. The facts which were concealed from plaintiffs are the basic facts upon which plaintiffs' claims are founded. Without the concealed information, plaintiffs could not have brought this action.

Without the information revealed at the committee hearings, plaintiffs could not know and did not know that

---

* See also the affidavits of plaintiffs Cestaro and Marchetti submitted below, 27a-33a.

the roles of Avis, ITT and their employees in this affair were anything other than innocent and legitimate, and that all of their activities met the "color of law" requirements of § 1983. See Adickes v. Kress & Co., 398 U.S. 144 (1970).

Without the information revealed at the committee hearings, plaintiffs could not know and did not know of Mackell's and Robertson's personal involvement in this affair. Absent evidence of their personal involvement, a civil rights action could not have been properly brought against Mackell and Robertson. See Rizzo v. Goode, 423 U.S. 362 (1976); Arroyo v. Schaefer, 548 F.2d 47,51 (2d Cir. 1977).

Without the information revealed at the committee hearings, plaintiffs could not know and did not know that the actions of all the defendants named in this suit were illicit, in bad faith and not for legitimate law-enforcement purposes, but were part of an illegal conspiracy among the defendants, who were bound together by an intricate web of illicit financial relations, to subvert the criminal process for their private gain.

In sum, without the information they learned through the hearings, plaintiffs could not have brought

this federal civil rights action against these defendants.

That plaintiffs could not have been aware of these critical facts until the public hearings cannot be disputed. These matters were all self-concealing.

The money and free cars supplied by Avis, the payments by ITT to Mackell's "foundation", the meetings between Avis and the Mackell defendants, were not matters of public record. Defendants -- not plaintiffs -- had sole access to the documents and personnel who could expose this information.

Moreover, there was no lack of diligence on plaintiffs' part to unearth defendants' concealment. Being without subpoena power, plaintiffs could not obtain documents or testimony from defendants to learn of the existence of the Avis-Mackell conspiracy. And their efforts to obtain the grand jury minutes were unsuccessful (29a).

Plaintiffs, in other words, did all they reasonably could to protect their rights. But, despite their efforts, they could not have asserted their claims against all the defendants named in this action until after the public hearings in May 1973.

This case, thus, falls squarely within the scope of the federal concealment doctrine as defined by Judge Friendly in Moviecolor Limited v. Eastman Kodak Company, supra, 288 F.2d at 87: concealment by defendants of "facts rendering a known transaction actionable."

The federal concealment doctrine tolls the running of the statute of limitations on plaintiffs' claim until May 1973; the court below agreed (47a). Accordingly, under the three-year limitations period of N.Y.C.P.L.R. § 214(2), the complaint, which was filed on April 12, 1976, is timely.

At this juncture, however, the court below erred. Instead of applying the three-year period to the complaint, the district court changed the rules in midstream. It held, incorrectly, that a different New York statute applies, and that under New York law, this action had to be commenced within two years from time of discovery (47a-48a).

This holding, however, erroneously denied plaintiffs the benefit of the federal concealment doctrine and replaced it with a New York state doctrine, which, under state law, does not apply to this case. It also ignored the holdings of this Court and the Supreme Court that the federal conceal-

ment doctrine is to be applied uniformly to all plaintiffs enforcing federally-created rights.

B. The New York Concealment Doctrine Does Not Apply to this Action.

To reach its result, the district court invoked N.Y.C.P.L.R. §203(f) (McKinney Supp. 1976) which provides in pertinent part:

> "...where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

There are very few actions under New York State law which are measured from the time of plaintiffs' discovery of the facts rather than from the time the events occurred. Indeed, the general rule in New York is set forth in section 203(a) of the C.P.L.R. and requires that, except when otherwise expressly provided, the limitations period is to be computed from the time of accrual, that is, from

when the events occurred N.Y.C.P.L.R. § 203(a) (McKinney 1972), not from time of discovery.

There are very few statutory exceptions to this general rule. As Dean McLaughlin has written: "[t]here are, to be sure, exceptions, but they are rare." McLaughlin, Practice Commentary to § 203, 7B McKinney's Consolidated Laws of New York, at 111 (1972).* The most common exception is an action for fraud which has a specific statutory provision exempting such an action from the general rule. N.Y.C.P.L.R. § 213(8)(McKinney Supp. 1976).

---

* The New York courts have consistently enforced this statutory requirement that concealment of the existence of a claim does not toll the statute of limitations absent an express legislative direction permitting such a toll. See, e.g., Guild v. Hopkins, 271 App. Div. 234, 63 N.Y.S. 2d 522 (1st Dept. 1946), aff'd,297 N.Y. 477, 74 N.E. 2d 183 (1947); Gerber v. Manufacturers Hanover Trust Co., 64 Misc.2d 687, 315 N.Y.S.2d 601 (Civil Ct. 1970); M & T Chemicals, Inc. v. IBM Corp. 403 F.Supp. 1145,1148 n.4 (S.D.N.Y. 1975).

The one recent exception to this uniform series of holdings was a 4-3 decision of the New York Court of Appeals, cited by the court below(50a), applying the "discovery" rule to a foreign object medical malpractice claim. Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). The New York State Legislature recently codified that decision in a separate statute. N.Y.C.P.L.R. § 214-a (McKinney Supp. 1976). Flanagan and § 214-a are by their terms limited to one type of medical malpractice claim. They do not express a policy of broadening the concealment doctrine to all types of claims and thus have no relevance to the action at bar.

There is no such statutory exception to the general rule for an action based upon a liability created by statute, N.Y.C.P.L.R. § 214(2)(McKinney Supp. 1976), the type of state claim comparable to a civil rights action. The limitation period for such an action, under New York law, is measured only from accrual, not from discovery. N.Y.C.P.L.R. § 203(a). The concealment of the underlying facts giving rise to such an action does not toll the limitations provision for this type of action under New York law.

Thus, under state law the only state limitation period applicable to this action which this Court can "borrow" is the three-year period of § 214(2). As there is no comparable tolling provision under state law for concealment of this type of action, the district court's analogy to the two-years-from-discovery provision of § 203(f) as the appropriate state statute to apply in this case was incorrect as a matter of state law.

In sum, there is only one appropriate state statute to apply to plaintiffs' complaint -- the three-year period of § 214(2), as tolled to the time of discovery by the federal concealment doctrine. The district court's application of the

shorter New York period to this action incorrectly construed and applied state law. It was also error as a matter of federal law.

C. Uniform Application of the Federal Concealment Doctrine to Federal Civil Rights Plaintiffs Makes This Action Timely.

The concealment doctrine, which tolls the running of the statute of limitations in this case, is a creature of federal law, not state law. It has been developed and applied to federally-created actions otherwise governed by borrowed state statutes of limitations in order to provide relief from those very state statutes which may not have a concealment doctrine, Holmberg v. Armbrecht, supra, or may have other provisions which unduly interfere with the enforcement of federally-created rights, Kaiser v. Cahn, supra. As this Court recently held in Kaiser:

> "We may in applying federal law to a claim based on a federal statute prevent a result that would substantially impair a valid federal interest. Thus a borrowed state statute may be tolled in conformity with federal doctrine where the right is a creature of federal statute...."
> 510 F.2d at 287.

Under the federal concealment doctrine, there is no requirement that an action must be commenced within a given period of time after discovery, such as two years, which period is shorter than the underlying limitations period.

Quite the contrary. The federal doctrine gives a plaintiff the entire limitations period he would have had had the actionable events been simultaneous with plaintiff's discovery of them. The purpose of the doctrine is to toll the time when the regular limitations period begins to run, from accrual upon the happening of the original events to the date of discovery. The rule is designed to extend the time in which a plaintiff must sue, not shorten it.*

Nor is it correct, as the court below held, to make reference to state law to limit the effect of the concealment doctrine. The doctrine applies equally to all federally-created actions, whether or not Congress has specified a limitations period for the particular action. Atlantic

---

* To hold otherwise would be to subvert the purpose of the concealment doctrine, which is to prevent defendants from profiting from their wrongdoing. Bailey v. Glover, supra, 21 Wall. (88 U.S.) at 350; cf. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959).

City Electric Co. v. General Motors Co., supra. It would unfairly discriminate among federal plaintiffs to allow the application of the doctrine to depend on the vagaries of the state law.

So held the Supreme Court in Holmberg v. Armbrecht, supra. In the words of Justice Frankfurter, writing for the Court:

> "It would be too incongruous to confine a federal right within the bare terms of a State statute of limitations unrelieved by the settled federal equitable doctrine as to fraud when even a federal statute in the same terms would be given the mitigating construction required by the doctrine." 327 U.S. at 397.

This Court, too, has stressed the need for uniform application of the federal concealment doctrine to all federally-created actions. Indeed, this same question -- whether the federal concealment doctrine applies uniformly among the federal courts wherever situated or varies according to the laws of the State in which the court sits -- was the central issue before this Court in Moviecolor Limited v. Eastman Kodak Company, supra:

> "But we still must endeavor to determine whether, on the narrower issue of the effect of the wrongdoer's concealment, Congress would have preferred uniformity among the federal courts with respect to the right it had created, a uniformity favorable to recoveries by plaintiffs, or uniformity as between the treatment of this right in federal courts and of rights of a related conceptual character in courts of the state where the federal court sits." 288 F.2d at 84.

Writing for the Court, Judge Friendly chose the path of uniformity among the federal courts, favorable to plaintiff's recovery:

> "It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer." Id.

As he noted, the need for uniformity is particularly significant when the type of claim is such that

> "enforcement of the right often serves not merely private but public ends. In this area, as contrasted with diversity litigation, federal interests transcend those of the states; state limitation statutes and doctrines are utilized to effect federal, not state, policy; and there is no reason for borrowing a state doctrine when there is an established federal one." Id. at 84-85 (footnote omitted).

Although Moviecolor involved an action brought under the Clayton Act, the same principles apply with equal force to actions brought under the Constitution and the Civil Rights Act of 1871.

Indeed the congressional purpose underlying the Civil Rights Act reinforces this conclusion. In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court extensively analyzed the legislative debates preceding the enactment of the Civil Rights Act and found that Congress had intended the legislation:

1. to "override certain kinds of state laws" abridging rights granted United States citizens by the Constitution and federal law;

2. to provide "a remedy where state law was inadequate" and

3. "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." 365 U.S. at 173, 174.

The court below disregarded the teachings of these cases. Instead, it misconstrued state law, and, "borrowing" the state concept it had created, used it to supplant the federal doctrine.

The effect of the decision below, thus, is to restrict the remedy created by 42 U.S.C. § 1983 by invoking

a nonexistent doctrine of state law--the very opposite of the purpose for which § 1983 was passed.

Furthermore, by so doing, the district court adopted a rule which destroys the uniformity among the federal courts in the application of the concealment doctrine required by Moviecolor, and improperly denies the plaintiffs in this case the "full benefit of federal law" to which they are entitled. Kaiser v. Cahn, supra.

There is but one federal concealment doctrine--not fifty. Its purpose is to extend the limitations period. and it applies to all actions to enforce federally-created rights, regardless of whether Congress specified the limitations period or it is "borrowed" from state law. Properly applied, the doctrine makes plaintiffs' complaint timely.

The ruling of the court below should be reversed.

II

THE MACKELL DEFENDANTS' ACTIONS ARE NOT PROTECTED BY ABSOLUTE IMMUNITY.

The Mackell defendants, who were all members of the Queens County District Attorney's office at the time of the conspiracy against plaintiffs, moved below to dismiss the complaint as to themselves only on the additional ground that since their official actions are clothed in absolute immunity, they cannot be sued in a civil action for damages.* In support of this contention they cite Imbler v. Pachtman, 424 U.S. 409 (1976), in which the Court held that when his "activities [are] intimately associated with the judicial phase of the criminal process. . . the prosecutor is immune from a civil suit for damages under

---

* Since it dismissed the complaint as time-barred, the district court did not reach this issue. As previously noted, counsel for the Mackell defendants have expressed their intentions of pressing this issue here as an alternative ground for affirmance of the district court. This question, therefore, as well as the matters considered in Point III, infra, which are being pressed by defendants Monty and ITT for similar reasons, are addressed in this brief.

None of the other defendants, who were not members of the District Attorney's staff, assert the defense of prosecutorial immunity.

§ 1983". 424 U.S. at 430 (footnote omitted).*

Imbler, however, is where the analysis must begin, not end.

Plaintiffs' complaint alleges prosecutorial misconduct long before criminal proceedings in the form of an indictment were ever instituted against plaintiffs. The complaint alleges that, after a meeting between District Attorney Mackell and representatives of Avis in 1970 or 1971, the Mackell defendants in concert with the Avis defendants and New York City policemen -- before plaintiffs were indicted -- planned and executed a raid on Sta-Brite for the purpose of confiscating thirty-two cars on which Sta-Brite had worked, and all of Sta-Brite's records. The raid was conducted without probable cause and without a warrant, although to disguise the illegality of their acts, the Mackell defendants prepared and carried a document purporting to be a grand jury subpoena. (Complaint, ¶¶ 14-21) (7a-8a).

The thirty-two confiscated automobiles were not brought to the police pound and were not

---

* For the purposes of this appeal, plaintiffs assume arguendo that any immunity the Mackell defendants may have to a § 1983 claim applies equally to an action brought directly under the Constitution. Economou v. U.S. Dept. of Agriculture, 535 F.2d 688, 695 n. 7 (2d Cir. 1976); Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F.2d 1339, 1346-47 (2d Cir. 1972).

used in the subsequent prosecution of the plaintiffs. The cars were delivered to Avis' facility at JFK International Airport and dispersed throughout the Avis system. The cars were never returned to Sta-Brite, nor has Sta-Brite's mechanic's lien with respect to its work on those cars ever been satisfied. (Complaint, ¶¶ 19-20,25)(8a,9a).

It is undisputed that the policemen who participated in this raid would not be absolutely immune from a civil damage action brought by plaintiffs. Pierson v. Ray, 386 U.S. 547 (1967). The police have only a qualified immunity -- the defense of "good faith and probable cause." Id. at 557.*

The question posed by plaintiffs' complaint is whether a prosecutor who plans and participates in an illegal search and seizure prior to indictment enjoys a greater immunity than a policeman who also participates in the same raid.

Plaintiffs contend that the answer to this question is no, and such is the conclusion of virtually every court which has addressed the matter.

---

* The Avis defendants, of course, have no immunity defense for their role in the raid. No individual policemen have been sued, as plaintiffs do not know the identities of the officers who participated in the raids, presumably on the orders of the Avis and Mackell defendants.

The Supreme Court explicitly left this question unresolved in Imbler v. Pachtman:

> "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S. at 430 (footnote omitted).

Nor has the Second Circuit ruled on this question. This Court's prior decisions in this area all deal with alleged prosecutorial misconduct during the judicial phase of the criminal process.*

The question however has received considerable judicial attention in other circuits. The results have been virtually unanimous: when acting like a policeman or investigator, the prosecutor is liable as one.

The leading case in this area is Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). In reaching its decision, the Ninth Circuit analyzed the basis of the doctrine of prosecutorial

---

* In recent pre-Imbler opinions, however, this Court had indicated some uneasiness with a broad grant of absolute immunity to prosecutors. See Martin v. Merola, 532 F.2d 191, 195-98 (2d Cir. 1976)(concurring opinion of Lumbard, J.); Fine v. City of New York, 529 F.2d 70, 73 n.6 (2d Cir. 1975); Dacey v. New York County Lawyers' Association, 423 F.2d 188, 192 n.5 (2d Cir. 1969)(Kaufman, C.J.).

immunity and concluded that it lay in the role the prosecutor plays in the judicial process. Absolute immunity for both judges and prosecutors while participating in the judicial process, the court held, is essential for the free and fearless conduct of judicial proceedings. 351 F.2d 536.

Nonetheless, when a prosecutor steps away from his role in the judicial process, the justification for his immunity ceases.

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity--integral relationship between his acts and the judicial process--ceases to exist." 351 F.2d at 536.

Once he begins to operate apart from the judicial process, the court reasoned that a prosecutor should have no greater immunity than any other public figure.

> "If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? ...To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." Id. at 536-37.

Noting that a "prosecuting attorney may have numerous roles", id. at 537 (footnote omitted), the court reversed

the district court's dismissal of the plaintiff's civil rights action and instructed the district court on remand to determine whether the defendants

> "may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them." Id.

The Ninth Circuit in Robichaud v. Ronan, supra, relied in part on the Fifth Circuit's earlier opinion in Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955). In the Lewis case, the Fifth Circuit noted that the two police officer defendants could be held liable for their part in forcing the plaintiff to plead guilty to a murder charge. The court refused to allow the prosecuting attorney, who had allegedly directed the police officers' efforts, to escape without any liability. The court held, in reversing the dismissal of a § 1983 complaint:

> "If the State's Attorney ordered and directed the officers to force the plaintiff to plead guilty, then certainly he is no less liable than are those who carried out the instructions. It would be wrong to hold the officers liable but the State's Attorney exempt." 227 F.2d at 129.

Similarly, in the instant case, it would be wrong for the Avis defendants and the police officers to be liable but the Mackell defendants exempt.

The Seventh Circuit reached a similar result in a more recent case whose facts, in this respect, are quite similar to the case at bar, Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). In Hampton the district court had dismissed a civil rights action against two prosecuting attorneys who had planned the infamous raid on the Black Panther headquarters in Chicago in which two people were killed, but allowed the action to proceed against the policeman who participated in the raid. The Hampton plaintiffs had alleged that the two prosecutors -- like the Mackell defendants -- had planned and participated in the raid, and had drafted and secured a search warrant as a cover.

The prosecutors argued that the purpose of the raid was to obtain evidence of criminal activity and that "evidence gathering is so closely related to the presentation of evidence at trial that it should be clothed with immunity." 484 F.2d at 609.

The Seventh Circuit rejected this argument. Jus-

tice (then Judge) Stevens, writing for the court, held that "the availability of immunity depends on the character of the conduct under attack", id. at 608, and that:

> "We find this argument [regarding evidence gathering] unpersuasive. Even though defensible if conducted in good faith with probable cause, the State's Attorney's alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under this direction.
>
> "The district court erred in holding that the immunity doctrine requires dismissal, without trial, of plaintiffs' charges against defendants Hanrahan and Jalovec." Id. at 609.

Similarly, the Mackell defendants should not be held immune from liability for their part in the raid on the plaintiffs at bar.

Other courts -- including the First, Sixth and District of Columbia Circuits -- which have examined similar and other fact patterns, both before and after Imbler, have likewise held that absolute immunity does not extend to acts committed by prosecutors in their roles as investigators and administrators. E.g., Walker v. Cahalan, 542 F.2d 681, 685 (6th Cir. 1976), cert. denied, 45 U.S.L.W. 3690 (U.S., April 19, 1977); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Guerro

v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974); Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969); Dodd v. Spokane County, Washington, 393 F.2d 330, 335 (9th Cir. 1968); Tomko v. Lees, 416 F.Supp. 1137 (W.D. Pa. 1976)(post-Imbler); Hearing Aid Ass'n of Kentucky, Inc. v. Bullock, 413 F.Supp. 1032, 1038-39 (E.D. Ky. 1976)(post-Imbler); Shifrin v. Wilson, 412 F.Supp. 1282, 1303-04 (D.D.C. 1976)(holding that Imbler does not overrule Apton v. Wilson, supra); Maney v. Ratcliff, 399 F.Supp. 760, 770 (E.D. Wis. 1975); Burkhart v. Saxbe, 397 F.Supp. 499, 503 n. 4 (E.D. Pa. 1975); Briggs v. Goodwin, 384 F.Supp. 1228 (D.D.C. 1974); Ames v. Vavreck, 356 F. Supp. 931, 937 (D. Minn. 1973) (prosecutor held not immune for role in directing warrantless raid on plaintiff's residence); Rousselle v. Perez, 293 F.Supp. 298, 299 (E.D. La. 1968) (prosecutor not immune from charges that he harassed political opponent and used office "to harass and oppress plaintiff in his business and economic affairs").

These cases are consistent with the recent analysis of Imbler v. Pachtman, supra, by the Second Circuit in Economou v. U.S. Dept. of Agriculture, 535 F.2d 688, 694 (2d Cir.1976). In Economou, this Court refused to extend absolute immunity to executive branch officials engaged in the initia-

tion and hearing of administrative proceedings. The Court quoted from Justice White's concurrence in Imbler, in which Justice White stated that since a grant of absolute immunity entirely negates the remedy created by § 1983, the Supreme Court has not awarded any official absolute immunity "in the absence of the most convincing showing that the immunity is necessary . . . 424 U.S. at 434."

Defendants here cannot make such a showing. In their investigative, as opposed to quasi-judicial functions, prosecutors have no more justification for absolute immunity than policemen and others who perform similar functions. Moreover, as the District of Columbia Circuit emphasized in Apton v. Wilson, supra, 506 F.2d at 94, when the prosecutor is not functioning as an integral part of the judicial process, the normal judicial restraints on his misconduct are absent, making the need for a judicial remedy all the more important. And, since the prosecutor is not serving in his role as advocate, there is no need to fear that prosecutorial timidity will impair the integrity of the judicial process.

In sum, it is neither good law nor good policy to extend the absolute immunity of prosecutors from civil liability beyond the scope of Imbler v. Pachtman, supra.

Accordingly, since plaintiffs allege the Mackell defendants committed illegal acts prior to the initiation of criminal proceedings against plaintiffs, the Mackell defendants' claim of absolute immunity should be rejected.

III

THE ALTERNATIVE GROUNDS FOR DISMISSAL OF DEFENDANTS MONTY AND ITT ARE WITHOUT MERIT

Defendants-appellees Monty and ITT offer additional grounds -- not reached by the district court -- why the complaint should be dismissed as to each of them. In essence, they each contend that plaintiffs have not sufficiently linked each of them to the conspiracy among the other defendants and that therefore they should be dismissed from the case.

Plaintiffs, however, have alleged specific facts indicating that both Monty and ITT were integral parts of the defendants' conspiracy and that prior to the completion of discovery, when all the facts which are now solely within defendants' possession are revealed, it would be premature to dismiss either defendant.

A. Defendant Monty

Monty moved for dismissal and summary judgment pursuant to Fed. R. Civ. P. 56(b) on the grounds that the complaint does not allege that he personally participated in the conspiracy against the plaintiffs (23a-26a). In support of this motion, his counsel submitted an affidavit stating that "the facts will reveal" that Monty's involvement was limited to assigning members of his staff to the investigation of plaintiffs (Tsimbinos affidavit, ¶ 2)(25a).

This affidavit, however, rather than supporting Monty's contention, is an admission that Monty knew of the investigation of plaintiffs and authorized and directed members of his staff to participate in it.

This admission is consistent with paragraph 28 of the complaint (9a-10a), which alleges that the press release issued by Mackell's office on the occasion of plaintiffs' arrests stated that Monty had supervised the investigation of plaintiffs.

Given these admissions by Monty in the District Attorney's own press release and in his counsel's affidavit, it cannot be said that there is no genuine issue of fact that

BEST COPY AVAILABLE

Monty, who was convicted of taking free cars from Avis (Com - plaint ¶4)(4a), did not participate in the investigation of plaintiffs and that his participation was entirely in good faith. Indeed, even the present limited record strongly suggests quite a different picture: Monty was an active and tainted participant in the conspiracy.

Plaintiffs cannot know the full extent of Monty's participation until after discovery. These facts are solely within defendants' control. Thus, until there has been full discovery into the facts concerning Monty's role in the investigation of plaintiffs, it would be premature and in violation of Fed. R. Civ. P. 56(f) to dismiss Monty from this action. National Life Insurance Co. v. Solomon, 529 F.2d 60-61 (2d Cir. 1975); Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975).

Furthermore, the affidavit submitted to assert not meet the requirements of Rule 56(e) to overcome the allega- tions of the complaint and to demonstrate that there is no genuine dispute that Monty was not a party to defendants' con- spiracy. Counsel's affidavit is at best hearsay and does not contain admissible evidence offered on personal knowledge by a person competent to testify to the matters stated therein.

In sum, Monty is not entitled at this stage of these proceedings to summary judgment in his favor.

B. Defendant ITT

Similarly, ITT moved to dismiss the complaint as to itself because plaintiffs allegedly failed to connect ITT with the conspiracy against defendants (19a-21a). This argument, too, should be rejected.

Plaintiffs allege, as ITT acknowledges (Inselbuch affidavit, ¶3)(21a), that ITT was, and is, the owner of Avis and that ITT donated more than $180,000 to a "foundation" for the sole use and benefit of Mackell, his family and staff.

These allegations raise the inference that ITT made these contributions to further the interests of its subsidiary, Avis, with knowledge of Avis' other contributions to Mackell's office and with intent to enhance further the illicit relationship between Avis and Mackell.

As previously noted, on this appeal plaintiffs are entitled to the benefit of all reasonable inferences in their favor that arise out of the facts they have alleged. Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir.) cert. denied, 400 U.S. 853 (1970). Since any reasonable construction of the complaint makes ITT's $180,000 one of the pillars on which the defendants' conspiracy rests, ITT's motion should be denied.

Moreover, as with Monty, the defendants are in sole possession of the facts and documents concerning ITT's role in defendants' conspiracy. Fed.R.Civ.P. 56(f). Until there has been full discovery on this issue, it cannot be said that as a matter of law, ITT's donation of $180,000 to a local prosecutor at a time when one of ITT's major subsidiaries was providing free cars to the same prosecutor in return for many favors, was entirely innocent and in good faith. Such a conclusion beggars the imagination and requires complete ignorance of human nature and current events.

Like Monty, ITT is not entitled to a dismissal at this stage of the proceedings.

CONCLUSION

For the reasons stated above, plaintiffs respectfully urge this Court to reverse the order of dismissal of the district court, vacate the judgment entered pursuant to that order and remand, with costs to appellants, for further proceedings so that plaintiffs may have their day in court.

Respectfully submitted,

Marshall Beil
Karpatkin, Pollet & LeMoult
Attorneys for Plaintiffs-Appellants

Michael N. Pollet
Steven Delibert
Of Counsel

May 27, 1977

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of May, 1977, I served two copies of the brief for appellants upon each of the attorneys for the defendants-appellees, by mailing such copies to each of them at the following addresses:

Arlene R. Silverman, Esq.
Assistant Attorney General
Two World Trade Center
New York, N. Y. 10047

Spiros A. Tsimbinos, Esq.
125-10 Queens Blvd.
Kew Gardens, N.Y. 11415

Michael A. Cardozo, Esq.
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, N. Y. 10022

Elihu Inselbuch, Esq.
Gilbert Segal & Young
430 Park Avenue
New York, N. Y. 10022

Dated: May 26, 1977

Marshall Beil
Marshall Beil

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(6154)